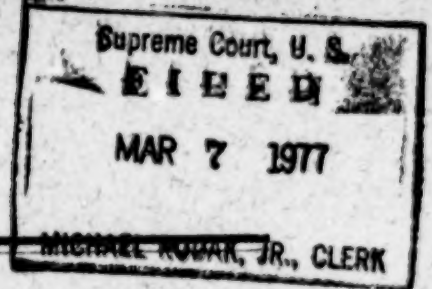


No. 76-827



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**In the Supreme Court of the United States**

**OCTOBER TERM, 1976**

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**JOHN GREGORY LAMBROS, PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

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**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE EIGHTH CIRCUIT**

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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**DANIEL M. FRIEDMAN,**  
*Acting Solicitor General,*  
**RICHARD L. THORNBURGH,**  
*Assistant Attorney General,*  
**SIDNEY M. GLAZER,**  
**HOWARD WEINTRAUB,**  
*Attorneys,*  
*Department of Justice,*  
*Washington, D.C. 20530.*

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**OPINION BELOW**

The opinion of the court of appeals (Pet. App. A-1 to A-11) is reported at 544 F. 2d 962.

**JURISDICTION**

The judgment of the court of appeals was entered on November 16, 1976. The petition for a writ of certiorari was filed on December 16, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**QUESTION PRESENTED**

Whether the district court complied with Rule 11 of the Federal Rules of Criminal Procedure in accepting petitioner's plea of guilty.

## STATEMENT

An indictment returned in February 1976 in the United States District Court for the District of Minnesota charged petitioner and several other persons with conspiracy to import and distribute cocaine and with a number of substantive narcotics offenses. On April 22, 1976, after three days of trial before a jury, petitioner offered to plead guilty to one substantive count of the indictment (possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1)) as well as to one count of another indictment, which charged him with assaulting United States Marshals with a deadly weapon at the time of his arrest on the drug charges, in violation of 18 U.S.C. 111 and 1114. The guilty pleas were offered pursuant to an agreement whereby petitioner would receive no more than five years' imprisonment on the drug offense, the sentence on the assault offense would be served concurrently, the remaining charges against petitioner would be dismissed, and certain cocaine-related charges would not be brought against petitioner's wife (Pet. App. A-2 to A-3).

Following a specific request by the district judge (Tr. 3),<sup>1</sup> the Assistant United States Attorney conducted an inquiry in court into the voluntariness of petitioner's guilty pleas and into petitioner's understanding of the consequences of the pleas. After government counsel had set forth the terms of the plea bargain and obtained the assent of petitioner and his counsel to its terms, petitioner admitted that he had committed the narcotics offense as alleged in Count 43 of the indictment (Tr. 3-5). The Assistant United States Attorney then advised

<sup>1</sup>"Tr." refers to the transcript of the guilty plea proceedings held on April 22, 1976.

petitioner that by pleading guilty he would waive certain constitutional rights, including trial by jury, the requirement that the government prove his guilt beyond a reasonable doubt and that the jury's verdict be unanimous, the right to summon and cross-examine witnesses, and the privilege against self-incrimination (Tr. 6-7). Petitioner was also informed of the maximum penalties that the court could impose and of the significant features of a special parole term (Tr. 9-10).

Finally, petitioner acknowledged that he had had ample opportunity to consult with his attorney about the details of the charges and that he was satisfied with his services (Tr. 5-6) and stated that he had not been threatened into pleading guilty, that there were no promises, secret understandings or beliefs as to sentencing, other than those appearing on the record, that he was entering the plea freely and with "a clear mind," and that he understood the consequences of his plea, but that he nevertheless desired to plead guilty because he was guilty of the offense charged (Tr. 5, 7, 10, 11). Petitioner's retained counsel agreed that petitioner was an intelligent individual, that he was pleading with "a clear mind," and that his answers to the inquiries at the Rule 11 proceeding "would stand" (Tr. 9-11).

After government counsel had completed the questioning the following colloquy ensued between the court and petitioner (Tr. 11-12):

The Court: Did you give true answers?

Defendant Lambros: Yes, Your Honor, I did.

The Court: To all these questions, they were all truthful?

Defendant Lambros: Yes, sir.



The Court: Do you want to plead guilty to this count?

Defendant Lambros: Yes, Your Honor, I do.

The Court: You are guilty?

Defendant Lambros: Yes, Your Honor, I am.

The Court: Do you have any questions you want to ask about it?

Defendant Lambros: No, Your Honor.

The Court: You fully understand everything that is going on?

Defendant Lambros: Yes, Your Honor.

The Court: Have you had enough time to visit with your lawyer about pleading guilty to this count?

Defendant Lambros: Yes, I have, Your Honor.

The Court: Then I will accept the guilty plea as to Count 43 with the understanding that I will read the probation report, and if I think the limitation of time that you have negotiated is appropriate I will accept it, and you have negotiated for a maximum of five years plus a special parole term of unlimited duration; and it's also understood, I understand, that you plead guilty to the assault count, the assault indictment in 3-76-17.

It's also understood that the United States Attorney will not prosecute your wife for some possible offense and that there will be no other drug-related prosecutions on behalf of the government. Is that the full understanding that you have?

Defendant Lambros: Yes.

Immediately following this inquiry, the Assistant United States Attorney, again pursuant to the court's direction, questioned petitioner on his plea to the assault charge (Tr. 15-20). Petitioner's counsel also participated in the inquiry and expressed his satisfaction with both pleas (Tr. 20-21). The district court then accepted petitioner's plea of guilty to the assault (Tr. 21).

On June 21, 1976, immediately prior to sentencing, petitioner moved to withdraw the guilty pleas, contending that his arrest on heroin charges four days earlier had violated the plea bargain and that he had not been informed at the time he pleaded guilty of the possibility of an enhanced sentence if he were to be convicted for a second narcotics offense (Pet. App. A-5). The district court denied the motion, finding that the pleas had been voluntary and that petitioner had been advised of all of the direct consequences of the pleas.<sup>2</sup>

Petitioner was then sentenced to ten years' imprisonment on the assault charge, to run concurrently with a five-year prison sentence on the narcotics offense. In addition, the court imposed a three-year special parole term and a fine of \$10,000 for the narcotics offense. On appeal, petitioner asserted for the first time that he must be given the opportunity to plead anew because government counsel, rather than the district court, had conducted most of the inquiry required by Rule 11 of the Federal Rules of Criminal Procedure. The court of appeals affirmed, rejecting petitioner's attack upon the adequacy of the Rule 11 proceedings (Pet. App. A-1 to A-11).

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<sup>2</sup>The district court also noted that withdrawal of the pleas would not be fair and just, since petitioner had not asserted his innocence and the government would be prejudiced by a plea withdrawal.

## ARGUMENT

Petitioner does not allege that his guilty pleas were involuntary, nor that any of the necessary inquiries prescribed by Rule 11 of the Federal Rules of Criminal Procedure to ensure the validity of a plea of guilty were disregarded. Indeed, as the court of appeals noted (Pet. App. A-7), petitioner "points to no way in which he was misled or prejudiced by the Rule 11 proceedings." Rather, petitioner's sole contention is that he must be allowed to withdraw his guilty pleas and to plead anew because most of the questioning during the Rule 11 proceedings was conducted by government counsel, at the district court's direction, rather than by the court itself. The court of appeals correctly rejected this claim (Pet. App. A-7):

Before accepting the guilty plea, the court by personal, direct inquiries \* \* \* ascertained that the defendant's responses to the Government attorney's questions were truthful, that he fully understood his rights and the consequences of his plea, that he had no question to ask, that he admitted that he had committed the acts charged and that he was guilty of the offenses charged, and that he had a full opportunity to consult with his attorney with respect to his plea.

Defendant was an intelligent person and was represented by competent, self-employed counsel.

The court by its personal questioning on a sound basis in effect adopted the extensive record made by the prosecuting attorney. \* \* \*

Relying on *McCarthy v. United States*, 394 U.S. 459, however, petitioner asserts that Rule 11 is satisfied only when the district judge himself conducts the guilty plea

inquiry. This is incorrect. In *McCarthy* this Court held that a defendant whose guilty plea had been accepted pursuant to a seriously defective Rule 11 proceeding must be permitted to withdraw his plea. The Court noted that "noncompliance deprives the defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate \* \* \* plea" (*id.* at 471-472), and it refused to assume from a silent record that the defendant had entered his plea "with a complete understanding of the charge against him" (*id.* at 464).

*McCarthy* was therefore concerned with the necessity of requiring the defendant to respond personally and affirmatively to inquiries, so that a record would be created that would enable the trial judge "to ascertain the plea's voluntariness [and] \* \* \* to support his determination in a subsequent post-conviction attack." *Id.* at 466. See *Brady v. United States*, 397 U.S. 742, 748-749; *Boykin v. Alabama*, 395 U.S. 238, 243 and n. 5; *Halliday v. United States*, 394 U.S. 831, 832. However, the Court expressly declined to establish a ritual for district courts to follow during a Rule 11 proceeding, recognizing that the nature of the inquiry must necessarily vary from case to case and that "[m]atters of reality, and not mere ritual, should be controlling." *McCarthy v. United States*, *supra*, 394 U.S. at 467-468, n. 20, quoting from *Kennedy v. United States*, 397 F. 2d 16, 17 (C.A. 6).

Thus, "the error that was fatal in *McCarthy* was not that the court had not posed the relevant questions, but that the record did not show that they had been posed at all." *Davis v. United States*, 470 F. 2d 1128, 1131 (C.A. 3). Here, however, the record of the guilty plea proceedings demonstrates that all the pertinent inquiries required by Rule 11 were made of petitioner. We submit that nothing



in Rule 11 prohibits such questioning of a defendant by the prosecutor, either in whole or in part, in the presence of the defendant's counsel and the court. See *United States v. O'Donnell*, 539 F. 2d 1233 (C.A. 9), certiorari denied, No. 76-234, November 15, 1976; *United States v. Yazbeck*, 524 F. 2d 641, 643 (C.A. 1); *Davis v. United States*, *supra*, 470 F. 2d at 1130-1132; *United States v. Benson*, 469 F. 2d 222 (C.A. 8). Although the Rule provides that "[b]efore accepting a plea of guilty \* \* \*, the court must address the defendant personally in open court and inform him of, and determine that he understands," the nature of the charge and the consequences of his plea, the crucial factor is not that the court itself ask the questions of the defendant, but that "the record leave no doubt that the defendant heard and understood what was said." *United States v. Yazbeck*, *supra*, 524 F. 2d at 643.

This position is supported by the Advisory Committee Notes to the 1966 Amendment of Rule 11, when the Rule was revised to contain the provision requiring the court to address "the defendant personally." In discussing this amendment the Advisory Committee remarked:

The second change expressly requires the court to address the defendant personally in the course of determining that the plea is made voluntarily and with understanding of the nature of the charge. The reported cases reflect some confusion over this matter. Compare *United States v. Diggs*, 304 F. 2d 929 (6th Cir. 1962); *Domenica v. United States*, 292 F. 2d 483 (1st Cir. 1961); *Gundlach v. United States*, 262 F. 2d 72 (4th Cir. 1958), cert. den., 360 U.S. 904 (1959); and *Julian v. United States*, 236 F. 2d 155 (6th Cir. 1956), which contain the implication that personal interrogation of the defendant is the better

practice even when he is represented by counsel, with *Meeks v. United States*, 298 F. 2d 204 (5th Cir. 1962); *Nunley v. United States*, 294 F. 2d 579 (10th Cir. 1961), cert. den., 368 U.S. 991 (1962); and *United States v. von der Heide*, 169 F. Supp. 560 (D.D.C. 1959).

Rule 11, Advisory Committee's Note, Proposed Rules of Criminal Procedure, 39 F.R.D. 171.

The revision was designed to eliminate the practice of accepting guilty pleas in reliance upon assurances by the defendant's counsel or on other assumptions not appearing in the record, rather than to mandate that the defendant be questioned only by the court. See *Phillips v. United States*, 519 F. 2d 483, 485 (C.A. 6); *Otero-Rivera v. United States*, 494 F. 2d 900, 903-904 (C.A. 1).<sup>3</sup> See also *Davis v. United States*, *supra*, 470 F. 2d at 1130-1131:

The word "personally" in the amendment to the rule follows and therefore would appear to modify "defendant," not "court." The change was aimed at preventing a reliance by the court upon a statement or response of the defense attorney rather than the defendant himself to establish voluntariness and understanding of the charge and consequences of the plea. There is no indication that permitting

<sup>3</sup>Although petitioner claims that *Phillips v. United States*, *supra*, conflicts with the present case, *Phillips* did not concern the issue whether a defendant's responses to inquiries by the prosecutor, rather than by the court, violates Rule 11. Instead, it involved a guilty plea proceeding in which the defendant had not been addressed personally by either the court or the prosecutor concerning the waiver of his constitutional rights and in which the court had improperly relied on assurances from defense counsel in determining that the plea was valid.

counsel for either the Government or the defendant to address appropriate questions to the defendant was an evil at which the amendment was aimed, and we do not perceive evil in such procedures.\* \* \*

As petitioner notes (Pet. 7), the Fifth Circuit has reached a contrary result in *United States v. Crook*, 526 F. 2d 708, a result that, for reasons we have already stated, we believe to be premised on an unnecessarily technical reading of Rule 11 that is supported neither by *McCarthy v. United States*, *supra*, nor by the history of the Rule.<sup>4</sup> In any event, we do not believe that it is necessary for this Court to resolve the conflict at this time. Not only does the Fifth Circuit stand alone in insisting that the district court itself conduct the entire interrogation of a defendant prior to accepting his guilty plea, but also the issue, which has arisen only infrequently, does not appear to be sufficiently important to the administration of the criminal laws to require further review. Moreover, the issue concerns an area of practice in which complete uniformity among the circuits does not appear to be essential.<sup>5</sup>

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<sup>4</sup>In addition, the Fifth Circuit's fear that questioning of a defendant by government counsel will lead to "an atmosphere of subtle coercion" (526 F. 2d at 710) is wholly illusory in the present case. The Assistant United States Attorney questioned petitioner pursuant to the court's express directions, and at no point during the proceedings did petitioner or his counsel voice any objections to this procedure. Indeed, petitioner's counsel participated in the inquiry conducted by the government attorney and remarked that petitioner's responses "would stand" and that petitioner was pleading with a "clear mind" (Tr. 9-11). Moreover, in response to questions by the court, petitioner stated that he had given truthful answers during the inquiry, that his plea was entirely free and voluntary, and that he "fully [understood] everything that [was] going on" (Tr. 11-12).

<sup>5</sup>In other areas involving the acceptance of guilty pleas the Fifth Circuit similarly has imposed more rigorous requirements than other courts of appeals. For example, the court has required that the

# CONCLUSION

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

DANIEL M. FRIEDMAN,  
*Acting Solicitor General.*

RICHARD L. THORNBURGH,  
*Assistant Attorney General.*

SIDNEY M. GLAZER,  
HOWARD WEINTRAUB,  
*Attorneys.*

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defendant be questioned under oath during the Rule 11 proceeding. See *Bryan v. United States*, 492 F. 2d 775, 781 (C.A. 5), certiorari denied, 419 U.S. 1079.